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ALEXANDER L. STEVAS
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No. 81-5321

In the Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 27, 1981
CERTIORARI GRANTED OCTOBER 19, 1981

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[R 8]

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA
HARDEE COUNTY

Spring Term, in the Year of Our Lord
One Thousand Nine Hundred and Seventy Five

#75-122

THE STATE OF FLORIDA

v.

EARL ENMUND

INDICTMENT FOR FIRST DEGREE MURDER

782.04(1) (Capital Felony)

TWO COUNTS

ROBBERY 813.011 (FELONY)

In the Name and by the Authority of the State of Florida:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and Seventy-Five in the County and State aforesaid unlawfully and from a premeditated design to affect the death of Thomas Henry Kersey, did inflict mortal wounds upon the said Thomas Henry Kersey, by shooting him with a firearm,

a further description of which is to the Grand Jurors unknown, from which mortal wounds the said Thomas Henry Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT TWO

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and State aforesaid unlawfully and from a premeditated design to effect the death of Eunice Mae Kersey, did inflict mortal wounds upon the said Eunice Mae Kersey, by shooting her with a firearm, a further

[R 9]

description of which is to the Grand Jurors unknown, from which mortal wounds the said Eunice Mae Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT THREE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and

State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and State aforesaid unlawfully by force, violence or assault or putting in fear did feloniously rob, steal and take away from the person or custody of Thomas Henry Kersey money or other property the subject of larceny, by the use of a firearm, to-wit: cash, in currency and coin of the United States of America, the property of Thomas Henry Kersey, with intent permanently to deprive the owner of his property, and the said Thomas Henry Kersey was then and there entitled to the possession of the said cash as against the defendant EARL ENMUND was not then and there the owner or entitled to possession of said cash, in violation of Section 813.011, Florida Statutes.

A TRUE BILL /s/ [Illegible], Foreman of Grand Jury
Presented in Open Court this 22nd day of May, 1975.

[R 10]

STATE OF FLORIDA

COUNTY OF HARDEE

The undersigned State Attorney states that he as State Attorney of the Tenth Judicial Circuit in and for Hardee County, Florida, as authorized and required by law, has advised the Grand Jury returning this Indictment.

/s/ Glen Darty
GLEN DARTY
As State Attorney
Tenth Judicial Circuit

[R 1602]

THE COURT: Please be seated.
Ladies and gentlemen of the Jury:

You have listened carefully to the evidence and the testimony in this case and to the argument of counsel. And I now ask that you give the same careful and close attention to the law which I have determined to

[R 1603]

be applicable to this case.

You alone, as jurors in this case, are sworn to pass on the issues of fact. And your verdict or verdicts in this case must be based solely on the evidence or lack of evidence and on the law as the law is now given to you by the Court.

These Defendants are charged, each of them, with three separate criminal offenses. Count One of the Indictment charges each of these Defendants with the first degree murder of Thomas Henry Kersey. Count Two of the Indictment charges each of these Defendants with first degree murder of Eunice Mae Kersey. Count Three of the Indictment charges each of these Defendants with the offense of robbery from Thomas Henry Kersey.

Now, a separate crime is charged against each of these Defendants in each count of the Indictment. Each crime and the evidence applicable to it and as it applies to each Defendant must be considered by you separately. The fact that you may find both or one of the Defendants guilty of one of the crimes charged must not affect your verdict with respect to the other Defendant or the other crimes charged.

Now, we will take these crimes as they appear in the Indictment. And each crime mentioned contains multiple lesser and included offenses. First,

[R 1604]

as to the crime of murder in the first degree: The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: justifiable homicide, excusable homicide, murder in the first, second or third degree, and manslaughter. The circumstances of each case determine whether homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful. Murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt in this case, before there can be a conviction, are: one, the death of the person alleged to have been killed; two, that such death was caused by the criminal act or agency of another; three, that the deceased was killed by the accused.

The killing of a human being by any person is justifiable homicide and lawful when committed in resisting an attempt to murder such person or to commit any felony upon him or when committed in the lawful defense of such person where there shall be reasonable ground to apprehend a design to commit a felony or do some great personal injury, and there shall be imminent

[R 1605]

danger of such design being accomplished or when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed or in lawfully suppressing a riot, or in lawfully keeping and preserving peace.

A homicide committed in self defense, that is, in the defense of the life of the accused or to protect his person from imminent danger of death or great bodily harm, is a justifiable homicide and lawful.

Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by law-

ful means with usual, ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Now, ladies and gentlemen, murder in the first degree.

Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary or kidnaping, aircraft

[R 1606]

piracy or unlawful throwing, placing or discharging of a destructive device or bomb, or when resulting from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user. That is the statutory definition of murder in the first degree.

The killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without a premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing or placing or discharging of a destructive device or bomb except as provided in murder in the first degree.

An act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it

is an act or series of acts if, first, a person of ordinary judgment would know it is reasonably

[R 1607]

certain to kill or do serious bodily injury to another, or, two, is done from ill-will, hatred, spite or evil intent, and, three, is one of such a nature that the act itself indicates an indifference to human life.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb.

A felony is a crime punishable by death or imprisonment in the State penitentiary.

A person is engaged in the commission of a felony when doing an act which is a part of the felony or necessary to the completion of the course of action constituting the felony or while escaping from the immediate scene of the felony.

Manslaughter is the killing of a human being by the act, procurement or culpable negligence of another or in cases where such killing shall not be justifiable or excusable homicide or murder.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a

[R 1608]

reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable per-

son would know would likely result in death or great bodily injury to some other person when this is done without the intent to injure any person but with utter disregard of the safety of others.

Now, let me summarize the elements of homicide.

The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows:

First, that the deceased is, in fact, dead.

Two, that the deceased was killed by the defendant or by someone acting in consort with the defendant.

Three, that the killing was neither justifiable nor excusable homicide.

If these elements are established, then it will be necessary for you to determine the degree of unlawful homicide.

If the defendant, in killing the deceased,

[R 1609]

did so while engaged in the perpetration of or in an attempt to perpetrate the crime of robbery as I will later define robbery for you, then, he should be found guilty of murder in the first degree. If the killing was not from a premeditated design to effect the death of any human being but was in the perpetration of or an act imminently dangerous to another evincing a depraved mind regardless of human life although without premeditated design to effect the death of any particular human being or when committed in the perpetration of or attempt to perpetrate an arson, rape, robbery, burglary, kidnaping, aircraft piracy, or in the unlawful throwing or placing or discharging of a destructive device or bomb, then that is murder in the second degree.

At this point let me distinguish between two elements of the felony murder aspect of murder in the first degree and in the second degree.

In order to sustain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery.

[R 1610]

In order to sustain a conviction of second degree murder while engaged in the perpetration of or the attempted perpetration of robbery, the evidence must establish beyond a reasonable doubt that the unlawful killing was committed in the perpetration of or in the attempted perpetration of robbery, and that the defendant actually, although not physically present at the time of the commission of the offense, did, nonetheless, procure, counsel, command or aid another to commit the crime.

Now, if the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, the defendant should be found guilty of murder in the third degree.

If the killing was by the act, procurement or culpable negligence of the defendant and was not murder in any degree or justifiable homicide or excusable homicide, the defendant should be found guilty of manslaughter.

Of course, as to Count One and Count Two of the Indictment, if any one of these elements of unlawful homicide has not been proved beyond a reasonable doubt, then the defendant should be found not guilty.

Now, as to Count One and Count Two of the Indictment, therefore, the offense charged within those

[R 1611]

counts are murder in the first degree or murder in the second degree or murder in the third degree or manslaughter or, of course, if there is no evidence beyond a reasonable doubt of any of the degrees of unlawful homicide, then, of course, there will be a verdict of not guilty.

Count Three of the Indictment charges the offense of robbery. Let me define robbery for you, and this definition of robbery is also applicable to the definition of robbery and felony murder and definition of first and second degree murder.

It is a crime of robbery for any person by force, violence or assault or putting in fear to rob, steal and take away from the person or custody of another any money or other personal property of any value whatsoever.

The essential elements of this offense which must be proved beyond a reasonable doubt before there can be a conviction in this case as to the robbery or to the felony murder portions of first and second degree murders are: one, the defendant did take from the person or immediate custody of the victim the property described in the information, that is, currency of the United States; two, the property was taken against the will of the victim and was taken by means of force, violence or assault or by putting the victim in fear; three, the taking was with

[R 1612]

the intent to permanently deprive the owner of the use of the property taken.

Now, the property taken must be of some value, but the extent of the value makes no difference in determining guilt of the crime of robbery.

The taking must be by the use of force or violence or by assault so as to overcome the resistance of the victim or by putting the victim in fear so that he does not resist. The law does not require that the victim of robbery resist

to any particular extent or that he offer any actual physical resistance if the circumstances are such that he is placed in fear of death or great bodily harm if he does resist. But unless prevented by fear there must be some resistance to make the taking one done by force or violence.

In order for a taking by force or violence or by assault to be by robbery it is not necessary the taking be from the person of the victim. It is sufficient if the property be in the presence of or under the immediate or actual control of the victim so that it cannot be taken without the use of force, violence or intimidation directed against the victim.

Now, the crime of robbery includes several lesser included offenses. Bear with us.

Robbery includes the lesser offense of

[R 1613]

assault with intent to commit robbery, attempted robbery, aggravated assault, assault and battery, bare assault, and petit larceny. I must define those for you.

It is a crime for any person to attempt to commit an offense prohibited by law and in such attempt do any act toward the commission of such offense.

The charge of robbery includes the lesser offense of an attempt to commit that crime.

An attempt to commit a crime consists of the formation of intention to commit that particular crime at that particular time and place, and the doing of some physical act toward and which was intended to accomplish the commission of the crime. The act done must be more than mere preparation to commit the crime. It must be one intended to actually do the wrong which constitutes the crime.

The crime of robbery also includes a lesser offense of assault with intent to commit that crime.

An assault is an intentional, unlawful threat by word or act to do violence to the person of another coupled with an apparent ability to do so, and doing some act which creates a well-founded fear of such violence being done.

An assault with intent to commit a crime upon another person consists of making assault upon that

[R 1614]

person by one having at the time of making the assault a fully-formed, conscious intent to commit that crime upon that person.

Robbery also includes the lesser included offense of aggravated assault. That is assault with a deadly weapon.

It is a crime to commit an aggravated assault upon another. An aggravated assault is an assault with a deadly weapon.

Assault is a threat by word or act to do violence to the person of another coupled with the apparent ability to do so, and doing some act which creates a well-founded fear of such violence being done.

Also, as to the offense of assault and battery.

It is a crime to make assault upon another. Assault and battery is an intentional and unlawful doing of violence to the person of another. It is not necessary that there be any serious or permanent injury, but there must be some actual intentional unlawful touching or striking of the person assaulted, and the act must be done against the will of the person assaulted.

And, of course, it is a crime to make a bare assault upon another. That is simple assault. Bare assault is simple assault.

[R 1615]

Bare assault is an intentional unlawful threat by word or act to do violence to the person of another coupled

with the apparent ability to do so, and doing some act which creates a well-founded fear of such violence being done.

And lastly, within the offense of robbery is the offense of petit larceny.

Petit larceny is the taking and carrying away and stealing of the personal property of another with the intent to deprive the owner permanently of his property and of a value of less than $100.00.

So, as to Count Three, just to bring it all back together, now, you have got the offense of robbery. Included within that offense would be the lesser included offenses of assault with—excuse me—of attempted robbery, assault with intent to commit robbery, aggravated assault, assault and battery, bare assault, and petit larceny.

Now, that ends my instructions on the criminal offenses comprehended by this Indictment. When I complete all my instructions I will suggest to you a method by which you might want to approach the analysis of all these offenses.

I now will get into the general instructions. Before I do, let's stand and stretch a minute.

[GENERAL INSTRUCTIONS OMITTED]

* * * * *

[R 1631]

THE COURT: Bring the Jury back, please.

(Thereupon the Jury returned to the courtroom.)

THE COURT: All right. Be seated, please.

Who is your foreman?

MR. SHACKLEFORD: I am, your Honor.

THE COURT: Mr. Shackleford, I understand you have a request for further instructions; is that correct?

MR. SHACKLEFORD: Yes.

THE COURT: All right, sir. And you wish to be instructed on the law of homicide?

MR. SHACKLEFORD: On the difference between

[R 1632]

first degree and second degree.

THE COURT: All right. If you will, be seated.

Although you have a specific request for only a portion of the instructions, under the law, the case law, I must re-instruct you on the entire law of homicide.

The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: justifiable homicide, excusable homicide, murder in the first, second or third degree, and manslaughter. The circumstances of each case determine whether homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful; murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt in this case, before there can be a conviction, are: one, the death of the person alleged to have been killed; two, that such death was caused by the criminal act or agency of another; three, that the deceased was killed by the accused.

[R 1633]

The killing of a human being by any person is justifiable homicide and lawful when committed in resisting an attempt to murder such person or to commit any felony upon him or when committed in the lawful defense of such person where there shall be reasonable ground to apprehend a design to commit a felony or do some great personal injury, and there shall be imminent danger of such design being accomplished or when necessarily committed in attempting by lawful ways and means to appre-

hend any person for any felony committed or in lawfully suppressing a riot, or in lawfully keeping and preserving peace.

A homicide committed in self defense, that is, in the defense of the life of the accused or to protect his person from imminent danger of death or great bodily harm, is a justifiable homicide and lawful.

Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by lawful means with usual, ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Now, ladies and gentlemen, murder in the

[R 1634]

first degree.

Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary or kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, or when resulting from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user. That is the statutory definition of murder in the first degree.

The killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless

of human life although without a premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping,

[R 1635]

aircraft piracy or unlawful throwing or placing or discharging of a destructive device or bomb except as provided in murder in the first degree.

An act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act or series of acts if, first, a person of ordinary judgment would know it is reasonably certain to kill or do serious bodily injury to another, or, two, is done from ill-will, hatred, spite or evil intent, and, three, is one of such a nature that the act itself indicates an indifference to human life.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb.

A felony is a crime punishable by death or imprisonment in the State penitentiary.

A person is engaged in the commission of a felony when doing an act which is a part of the felony or necessary to the completion of the course of action constituting the felony or while escaping from the immediate scene of the felony.

Manslaughter is the killing of a human being

[R 1636]

by the act, procurement or culpable negligence of another or in cases where such killing shall not be justifiable or excusable homicide or murder.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when this is done without the intent to injure any person but with utter disregard of the safety of others.

Now, let me summarize the elements of homicide.

The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows:

First, that the deceased is, in fact, dead.

Two, that the deceased was killed by the defendant or by someone acting on consort with the defendant.

[R 1637]

Three, that the killing was neither justifiable nor excusable homicide.

If these elements are established, then it will be necessary for you to determine the degree of unlawful homicide.

If the defendant, in killing the deceased, did so while engaged in the perpetration of or in an attempt to perpetrate the crime of robbery as I will later define robbery for you, then, he should be found guilty of murder in the first degree.

If the killing was not from a premeditated design to effect the death of any human being but was in the perpetration of or an act imminently dangerous to another evincing a depraved mind regardless of human life al-

though without premeditated design to effect the death of any particular human being or when committed in the perpetration of or attempt to perpetrate an arson, rape, robbery, burglary, kidnaping, aircraft piracy, or in the unlawful throwing or placing or discharging of a destructive device or bomb, then that is murder in the second degree.

At this point let me distinguish between two elements of the felony murder aspect of murder in the first degree and in the second degree.

In order to sustain a conviction of first

[R 1638]

degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery.

In order to sustain a conviction of second degree murder while engaged in the perpetration of or the attempted perpetration of robbery, the evidence must establish beyond a reasonable doubt that the unlawful killing was committed in the perpetration of or in the attempted perpetration of robbery, and that the defendant actually, although not physically present at the time of the commission of the offense, did, nonetheless, procure, counsel, command or aid another to commit the crime.

Now, if the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, the defendant should be found guilty of murder in the third degree.

If the killing was by the act, procurement or culpable negligence of the defendant and was not murder in any degree or justifiable homicide or excusable homicide,

[R 1639]

the defendant should be found guilty of manslaughter.

Of course, as to Count One and Count Two of the Indictment, if any one of these elements of unlawful homicide has not been proved beyond a reasonable doubt, then the defendant should be found not guilty.

Now, as to Count One and Count Two of the Indictment, therefore, the offense charged within those counts are murder in the first degree or murder in the second degree or murder in the third degree or manslaughter or, of course, if there is no evidence beyond a reasonable doubt of any of the degrees of unlawful homicide, then, of course, there will be a verdict of not guilty.

Okay. You may now retire to further consider your verdict.

• • • • •

[R 1685]

THE COURT: All right.

Ladies and gentlemen of the Jury, once again, you know what your responsibility today is at this portion of the trial. You are serving now as advisors to the Court and as advisors to the Court it will be your responsibility to make a recommendation. But the Court has the final discretion, responsibility, in this matter, and I have the power of independent judgment. Under these procedures, therefore, it is now your duty and responsibility to determine by a majority vote whether or not you advise

[R 1686]

the imposition of the death penalty based upon, one, whether sufficient aggravating circumstances as hereafter enumerated exist to justify the death penalty; two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist; and, thirdly, based upon these

considerations, whether the Defendants should be sentenced to life or death.

Aggravating circumstances are limited by Statute to the following:

(A) The capital felony was committed by a person under sentence of imprisonment.

(B) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(C) The defendant knowingly created a great risk of death to many persons.

(D) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy or the unlawful throwing or placing or discharging of a destructive device or bomb.

(E) The capital felony was committed for

[R 1687]

the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(F) The capital felony was committed for pecuniary—again, that means for money—or other valuable consideration.

(G) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(H) The capital felony was especially heinous, atrocious or cruel.

Mitigating circumstances by Statute are:

(A) The defendant has no significant history of prior criminal activity.

(B) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(C) The victim was a participant in the defendant's conduct or consented to the act.

(D) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(E) The defendant acted under extreme duress or under the substantial domination of another person.

(F) Capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct

[R 1688]

to the requirements of law was substantially impaired. And,

(G) The age of the defendant at the time of the crime.

Now, your determination and recommendation must be made objectively as it relates to each Defendant without bias or prejudice either for or against the State or for or against either one of these Defendants.

Now, you will have two forms of verdict as to each count and as to each Defendant. There are two counts of first degree murder. Your advisory sentence as to Count One, and this will be the one as it relates to Earl Enmund: We, the Jury, have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances, and we do find and advise that the aggravating circumstances do outweigh the mitigating circumstances. A majority of at least seven of us, therefore, advise the Court that the death penalty should be imposed herein upon the Defendant by the Court as to Count One.

Then, as to each count, you have the reverse,

[R 1689]

whether at least five—excuse me—at least seven of you find that the mitigating circumstances outweigh the aggravating circumstances.

All right. Members of the Jury, first of all, before you retire, are there any objections or corrections to the Court's instructions from the State?

MR. WILCOX: No, your Honor.

THE COURT: From Defendant Sampson Armstrong?

MR. ANDERSON: Yes, your Honor. I have one objection and correction.

I think when you were listing the mitigating circumstances, Subparagraph (A), you read the defendant has no subsequent history or no criminal activity. I think it should have been instead of or.

MR. WILCOX: I heard the same thing Mr. Anderson did.

MR. ANDERSON: I am sure it is just a mistake.

THE COURT: All right. Let me read it again.

The defendant has no significant history of prior criminal activity.

[R 107]

IN THE CIRCUIT COURT OF
HARDEE COUNTY, FLORIDA

Case No. 75-122

STATE OF FLORIDA

vs.

EARL ENMUND

ADVISORY SENTENCE—COUNT I

We, the jury, have heard evidence under the sentencing procedure in the above cause, as to whether aggravating circumstances, which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the aggravating circumstances do outweigh the mitigating circumstances.

A majority of at least seven (7) of us, therefore, advise the Court that the death penalty should be imposed herein upon the defendant by the Court as to Count I.

/s/ Marcus D. Shackleford
Foreman

Wauchula, Florida
September 30, 1975

[R 108]

IN THE CIRCUIT COURT OF
HARDEE COUNTY, FLORIDA

Case No. 75-122

STATE OF FLORIDA

vs.

EARL ENMUND

ADVISORY SENTENCE—COUNT II

We, the jury, have heard evidence under the sentencing procedure in the above cause, as to whether aggravating circumstances, which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the aggravating circumstances do outweigh the mitigating circumstances.

A majority of at least seven (7) of us, therefore, advise the Court that the death penalty should be imposed herein upon the defendant by the Court as to Count II.

/s/ Marcus D. Shackleford
Foreman

Wauchula, Florida
September 30, 1975

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA

SEPTEMBER TERM 19 75

CASE NO. 75-1[illegible]

STATE OF FLORIDA

vs

Earl Enmund
Defendant

JUDGMENT AND SENTENCE

The Defendant EARL ENMUND being personally before this Court, represented by MICHAEL TROMBLEY, his attorney of record, having been tried and found guilty of the crime of / entered a plea of guilty to the crime of / entered a plea of Nolo Contendere to the crime of COUNT I. FIRST DEGREE MURDER. COUNT II. FIRST DEGREE MURDER. COUNT III. ROBBERY and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant EARL ENMUND is hereby adjudicated guilty of the crime of *. It is the sentence of the law that said Defendant be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of *** in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at _____ type institution.)

It is further ordered that you shall be allowed 153 DAYS credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is (concurrent)(consecutive) with the sentence imposed for the crime of _____ in Case _____, _____ County, No. _____. (Strike if not applicable.)

It is further ordered that the Sheriff of HARDEE County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

*FIRST DEGREE MURDER, ON BOTH OF THE TWO COUNTS, AND COUNT III, ROBBERY.

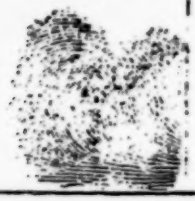
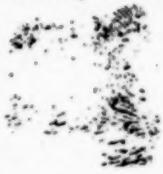
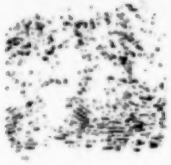
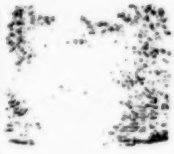
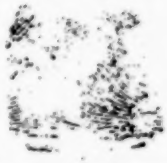
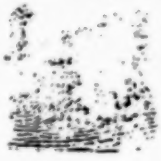
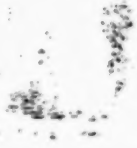
*** THE REST OF YOUR NATURAL LIFE, FOR COUNT III, TO RUN CONCURRENT WITH COUNTS I AND II.

FOR COUNTS I AND II, TO BE TRANSPORTED TO STATE PRISON TO BE PUT TO DEATH BY ELECTROCUTION.

25

The following are the fingerprints of the above-named Defendant, Earl Enmund:

(FINGERPRINTS)

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

DONE AND ORDERED IN Open Court at HARDEE County, Florida, this 30th day of SEPTEMBER A.D. 19 75. I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, EARL ENMUND and that they were placed thereon by said Defendant in my presence in Open Court this date.

William A Norris
JUDGE

[R III]

[R 1699]

THE COURT: Earl Enmund, you have been found guilty by a jury of your peers and adjudged guilty of the offenses of two counts of murder in the first degree and one count of robbery. Can you or anyone in your behalf give to the Court any reason why sentence should not be imposed at this time?

Mr. Trombley?

MR. TROMBLEY: Your Honor, we can give no reason why sentence should not be imposed at this time.

THE COURT: Mr. Enmund, is there anything you wish to say in your behalf?

DEFENDANT EARL ENMUND: No.

THE COURT: Listen very carefully to me, Mr. Enmund, now.

You will have thirty days from today's date within which to appeal the judgment and sentence of the Court. You must do so by filing a notice of appeal in the office of the Clerk of the Circuit Court whose office is in this building. If you fail to do that, that will constitute a waiver, that is, you give up your right to appeal.

You have a right to have an attorney to represent you for the purpose of appeal. Should you not have the funds to hire an attorney, one will be appointed to represent you. Do you understand?

[R 1700]

DEFENDANT EARL ENMUND: I understand.

THE COURT: The Court in this case has the benefit of the recommendation from the Jury and the Court is mindful and is aware of all of the facts and circumstances, including the background of this Defendant based on the Court's participation in this trial and of the trial of one Jeanette Armstrong.

The Court finds in this case that the aggravating circumstances outweigh the mitigating circumstances. In

particular, and the Court will further set forth its reasons in a written judgment to be filed in the court files, that this capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of or the attempt to commit or flight after committing or attempting to commit a robbery; the Court would further find this capital felony was committed for pecuniary gain and this capital felony was especially heinous, atrocious or cruel. The Court will further find as to this Defendant the record indicated in the sentencing procedure that he had previously been convicted of a felony involving the use of or threat of use of violence to a person. The Court can find no mitigating circumstances as it applies to this Defendant.

Therefore, as to Count Three of the Indictment, that is, the robbery charged, having adjudged the

[R 1701]

Defendant guilty. It will be the judgment of the Court and the sentence of the law that you serve the rest of your natural life in prison, that sentence, however, to run concurrent with the sentences to be imposed in Counts One and Two of the Indictment.

As to Counts One and Two of the Indictment, (Court rising to its feet) Earl Enmund, it will be the judgment of the Court and sentence of the law you be transported to the State Penitentiary, there to be held for a time and manner prescribed by law and thereafter to be put to death by electrocution. And may God have mercy on your soul. (Court resuming seat.)

Take Defendant Earl Enmund into custody.

* * * * *

[SR 11]

IN THE CIRCUIT COURT OF
HARDEE COUNTY, FLORIDA
CRIMINAL DIVISION

Hardee County Case No. 75-122

Supreme Court Case No. 48,525

STATE OF FLORIDA

vs.

EARL ENMUND

FINDINGS OF FACT—EARL ENMUND

The defendant was indicted by the Grand Jury of Hardee County, Florida, for two (2) counts of Murder in the First Degree and one (1) count of Robbery. Trial by jury was held and the defendant was found guilty of two (2) counts of Murder in the First Degree and one (1) count of Robbery. In a separate proceeding a majority of the trial jury recommended to the Court that the death penalty be imposed as to each count of Murder in the First Degree.

On September 30, 1975, the Court imposed the death penalty as to each count of Murder in the First Degree, however, the Court neglected to file written findings of fact as required by Section 921.141, Florida Statutes (1975). The Court did make certain findings in the sentencing dialogue. A transcript of the sentencing dialogue involving the defendant Enmund is attached hereto and incorporated herein by reference. Subsequently the Supreme Court of Florida remanded the case directing the undersigned to file written findings of fact as required by the Florida Statutes.

In accordance with the mandate of the Florida Supreme Court the Court makes the following findings of fact:

1. As an aggravated circumstance, the capital felony, that is, the murders of Thomas Henry Kersey, aged 86 years and his wife Eunice Maye Kersey, aged 74, were committed while the defendant Enmund was engaged, or was an accomplice, in the commission of, or

[SR 12]

an attempt to commit an armed robbery. FS 921.141 (5) (d)

2. As a further aggravating circumstance, the Court finds that the capital felony was committed for pecuniary gain. FS 921.141(5)(f). The evidence is abundantly clear that the armed robbery was committed for pecuniary gain and that the defendant Enmund was previously aware that Mr. Kersey had a reputation for keeping large sums of money on his person. The defendant Enmund actually saw Mr. Kersey with money, and the testimony amply indicates that the armed robbery of April 1, 1975, was planned ahead of time by the defendant Enmund.

3. As a further aggravating circumstance, the Court finds that the capital felony was especially heinous, atrocious, or cruel. FS 921.141(5)(h). The evidence amply supports a finding that the killing of Mr. Kersey aged 86, and Mrs. Kersey aged 74, was not a spontaneous matter. A reasonable person must conclude that the killings were done for no other purpose than to eliminate Mr. and Mrs. Kersey as witnesses to the armed robbery. The killings were premeditated in that Mr. Kersey was shot two (2) times and Mrs. Kersey was shot six (6) times. Two (2) bullets were subsequently recovered from the house, and one (1) in the water heater and one (1) in the doorjamb. The medical examiner testified that in his opinion the bodies had to have been shot while in a prone position (his alternative explanation was that someone could have stood on a roof and shot down, or else tied the Kerseys' by their feet, hoisted them up and shot them from below). The entry of the bullets indi-

cates that Mr. and Mrs. Kersey were in a prone position, that is, helpless to resist. The evidence indicates that Mrs. Kersey was shot first in the left side and that these wounds were not fatal, and that thereafter someone stood back and fired upon her prone body and then fired the bullets into the heater and the wall. Further, two (2) different weapons, that is, a .22 caliber

[SR 13]

weapon and a .38 caliber weapon were fired at and into Mr. and Mrs. Kersey.

Three individuals were charged with these crimes. The defendant Enmund and the defendant Sampson Armstrong were tried together and the defendant Jeanette Armstrong was tried separately. The Court knows from this trial and from the trial of Jeanette Armstrong that she was shot at the scene and sustained serious wounds. Since the defendant Jeanette Armstrong was seriously wounded and since both Mr. and Mrs. Kersey were each shot with bullets from two (2) different caliber guns, and since the evidence establishes that Mr. and Mrs. Kersey were each shot while in the prone position, it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey.

4. As a further aggravating circumstance, the Court finds that the defendant Enmund was previously convicted of a felony involving the use or threat of violence to the person. FS 921.141(5)(b). At the advisory hearing the State introduced a certified copy of a Judgment and Committment from the United States District Court, Southern District of Georgia, establishing that on April 10, 1957, the defendant Enmund was convicted of two (2) separate offenses of robbery by the use of violence.

5. The other aggravating circumstances to-wit: FS 921.141(5)(a); 921.141(5)(c); 921.141(5)(e); and, 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving the defendant Earl Enmund, the Court finds that *none* of the statutory mitigating circumstances applied to this defendant:

1. In particular, the Court has considered FS 921.141 (6) (a), and finds that the defendant has previously been convicted of the felony of robbery.

[SR 14]

2. As to FS 921.141 (6) (b), there is absolutely no evidence or suggestion that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. As to FS 921.141 (6) (c), there is absolutely no evidence that the victims were a participant in the defendant's conduct or consented to the act.

4. As to FS 921.141 (6) (d), the evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.

5. As to FS 921.141 (6) (e), there is absolutely no evidence that defendant acted under extreme duress or under the substantial domination of another person.

6. As to FS 921.141 (6) (f), there is absolutely no evidence that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. As to FS 921.141 (6) (g), the defendant was 42 years of age at the time of this offense.

Therefore, in consideration of the evidence presented at trial and at the sentencing hearing as to the defendant Earl Enmund, the Court finds that the aggravating circumstances of these capital felonies outweigh the mitigating circumstances, and upon consideration thereof, the Court was of the opinion at the time of sentencing and is now, some months later, that the sentence of death is justified and appropriate as to each Count of Murder in the First Degree.

[SR 15]

ENTERED in Bartow, Polk County, Florida, this 22nd day of April, 1977.

/s/ William A. Norris, Jr.
WILLIAM A. NORRIS, JR.
Circuit Judge

copies furnished to:

Robert E. Pyle, Esquire
Steven H. Denman, Esquire
George R. Georgieff, Esquire

SUPREME COURT OF FLORIDA

No. 48,525

EARL ENMUND, APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

[April 16, 1981]

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction on two counts of murder in the first degree and one count of robbery. The Circuit Court of the Tenth Judicial Circuit, in and for Hardee County, sentenced appellant Earl Enmund to death, thus vesting in this Court jurisdiction of his appeal. Art. V, § 3(b)(1), Fla. Const.

The appellant and co-defendant Sampson Armstrong were tried together and convicted of the first-degree murders and robbery of Thomas and Eunice Kersey. After returning verdicts of guilt the trial jury heard evidence on the issue of sentence pursuant to section 921.141, Florida Statutes (1975), and recommended the death penalty for both defendants. The trial court imposed sentences of death on the appellant for the two counts of first-degree murder and a sentence of life imprisonment for the crime of robbery. We affirm the judgments of guilt of murder and robbery and the sentences of death.

I. Facts

On April 1, 1975, at about eight o'clock, a.m., the bodies of Thomas and Eunice Kersey were discovered by their daughter in their rural Hardee County home, located on state highway 62 between Fort Green to the west and Wauchula to the east. Mr. and Mrs. Kersey, aged eighty-six and seventy-four respectively, had been shot to death.

Some of the evidence constituting the state's case in the trial court consisted of physical items recovered at the scene and examined in the course of investigation. The bodies were found on the kitchen floor, near the back door of the home. There was a quantity of blood on the floor, some five feet away from where the bodies were lying, that prompted the authorities to investigate the possibility that one of the perpetrators was wounded during the attack. Later that morning, police found Jeanette Armstrong, the wife of co-defendant Sampson Armstrong, being treated for a gunshot wound in a hospital in nearby Avon Park, in Highlands County. The blood recovered at the scene proved to be of a different type from either of the Kerseys' blood, and to match the blood type of Jeanette Armstrong.

On the ground outside the house, investigators found a plastic jug filled with water.

There were four firearm projectiles found at the scene. One was on the ground outside the house, one in the door jamb of the back door, one in the water heater in the kitchen of the house, and one on the floor, under the body of Mrs. Kersey. Mrs. Kersey was shot six times in all, with three of the wounds being superficial so that three of the bullets exited the body. Three bullets remained in her body and were recovered. The three bullets found in the body all entered the body in the right side and passed downward.

Mr. Kersey was shot twice. One bullet entered his right arm and passed on through his heart to the left side of his body. The other entered his chest from di-

rectly in front. Both bullets were recovered. The bullet that entered from the right side had a slight downward angle. The one that entered the front of the chest was almost straight in its path from front to back. According to expert firearms identification testimony, one of the bullets recovered was a .38 caliber and the other was a .22 caliber. The .38 caliber bullet from the body of Mr. Kersey, a .38 caliber bullet from the body of Mrs. Kersey, and the .38 caliber bullet found in the kitchen door jamb, were all fired from the same weapon. The .22 caliber bullet found in the body of Mr. Kersey and a .22 caliber bullet from Mrs. Kersey were both fired from the same gun.

The pathologist who testified at trial told the court and the jury that when a bullet enters the body, it can be deflected in numerous ways, so that it is difficult to discern the angle of fire from the path of the bullet. With regard to the specific question of reconstructing the position of Mrs. Kersey when she was shot, based on the paths of the bullets, the pathologist testified, "Well, there are all sorts of possibilities. . . . There is really no way that I could determine what position her body was in when she was shot. . . . [S]he was shot from below, above, and behind." None of the entrance wounds on either of the bodies were inflicted from a range of closer than several feet away.

The state presented the testimony of a witness who drove by the Kersey home between 7:30 and 7:40 a.m. on the day the bodies were found. When she passed the Kersey home, she saw on the side of the road a large, cream-colored car with a license tag bearing the prefix number 18. There was a black man in the car. Another witness for the state drove by the house at 7:35 that morning and saw a car parked beside the road about two hundred yards west of the house. It was a large, yellow car with a dark colored top. There was one person in the car.

The state's evidence also included the testimony of two of the Kerseys' neighbors. One testified that on April 1st he was at work on his own land only two or three hundred yards from the Kerseys' house when, at about 7:45 a.m., he heard from six to fifteen shots of gun fire and some high-pitched screaming. The other neighbor said that he lived only two hundred yards west of the Kerseys, and that between 7:30 and 8:00 o'clock that morning he heard about seven loud sounds. He would have thought that they were caused by Mr. Kersey hammering to separate some scrap metal, except for their irregular sequence. From the sounds he remembered, he concluded that they also could have been gunfire.

A neighbor of the appellant also testified for the state. He said he lived about three-fourths of a mile from Enmund's home, and that they both lived on a road that runs off of New York Avenue south of the town of Wauchula. This witness testified that on the morning of April 1st, at about 6:30 he was standing out beside the road, New York Avenue, that goes into Wauchula to the north. He was waiting for a ride that was to take him to another town on personal business. The person who was to meet him there did not come that morning, but he was still standing there waiting for him after 8:00 o'clock. The witness said that at approximately 6:30 or 6:45, he saw Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town (the town of Wauchula). At about 8:00 o'clock, the car came back, traveling "pretty fast" in a southerly direction on New York Avenue, with the appellant driving, Ida Jean Shaw in the front seat, and one of the other two people in the car lying down across the back seat.

The husband of the Kerseys' granddaughter testified that Mr. Kersey usually kept large amounts of cash on his person. He generally kept the cash in the form of

one-hundred-dollar bills. It was not unusual for him to have from ten to twenty of these on his person at any given time. He kept the money in his wallet, and the wallet was in his hip pocket at all times. He normally slept in his regular work clothing and kept the wallet in his pocket even as he slept.

Mr. Kersey, the witness testified, liked to show his cash to people he dealt with, and he did so frequently and indiscriminately. He tended to save his money rather than to spend it, and he was proudly vocal about having it. He was a large, strong man who felt that he could protect his wallet.

Another witness testified that two weeks prior to the murders, he saw that Mr. Kersey had from twelve to fifteen hundred dollars on his person.

A few weeks prior to the murders, the appellant and a friend jointly purchased a calf from Mr. Kersey. They paid him in cash and when Mr. Kersey took out his wallet to put away the money he showed them its contents. Appellant Enmund said, "Look at the money this man's got." Mr. Kersey responded, "That ain't no money. I can dig up $15,000, $16,000 any time I want to." Appellant's friend told Mr. Kersey that he shouldn't be showing his money around like that. Mr. Kersey said, "I know you, Jim." The other man responded, "Yeah, you know me but you don't know the rest of them." After the killings, Mr. Kersey's wallet was not found on his person or anywhere in the house.

J. B. Neal testified that at about noon on April 1, 1975, he saw co-defendant Sampson Armstrong in Lake Placid, in Highlands County. Armstrong told Neal that he and his wife Jeanette had done a robbery that morning at a ranch house outside of Wauchula and that Jeanette had been shot. Armstrong told the witness that they had gone to the back door of the house of an elderly man and woman, saying that they needed water for an overheated car. When Mr. Kersey came out of the house, Armstrong grabbed him, held his gun on him,

and told Jeanette to get the money out of his pocket. Then, the old man cried out to his wife, and through a window Armstrong saw Mrs. Kersey coming out the front door and around the house with a gun. Mrs. Kersey shot Jeanette Armstrong. Then Armstrong knocked the old man down and shot Mrs. Kersey. Mr. Kersey got back up and Armstrong shot him in the chest. After the shooting, they put the old people in the house, took the money and left.

Jeanette Armstrong is the daughter of Ida Jean Shaw. In April of 1975, Ida Jean Shaw and Earl Enmund were living together as husband and wife, and had been doing so for about twelve years.

There was testimony that the investigating authorities, based on witnesses' descriptions of the car seen near the Kersey home the morning of the murders, began to search for a large, yellow or cream-colored car with a dark top and having an "18" license tag prefix. They found a car meeting this general description in the possession of Ida Jean Shaw.

At Walker Memorial Hospital in Avon Park on the morning of the murders, police questioned Ida Jean Shaw concerning Jeanette Armstrong's gunshot wound. She told them that she and Jeanette had been traveling that morning from Wauchula to Avon Park when Jeanette entered an orange grove to urinate and was shot. In the subsequent course of the investigation of the Kersey murders, Ida Jean Shaw gave a statement to the state attorney implicating the appellant and Sampson Armstrong in the crimes. Subsequent to that initial statement, she gave two statements, one of them a formal deposition, in which she repudiated the original statement. In these statements she said that Jeanette Armstrong left her house on March 31, 1975 with two men referred to as Luke and Willie. According to this story, Jeanette said that they were going to Fort Myers to a nightclub. On the following morning, Luke and Willie brought Jeanette home wounded. Jeanette, Luke and

Willie then told Ms. Shaw to tell anyone who asked that Jeanette had been shot while trespassing in a citrus grove. The import of the story told in the depositions was to implicate "Luke and Willie" in the Kersey murders and to exculpate the defendants. In one of her depositions, Ida Jean Shaw stated that her earlier statement implicating the defendants in the crimes was false and was fabricated by agreement with Jeanette Armstrong and calculated to put Earl and Sampson in jail and thus be free of the strictures of married life.

Ida Jean Shaw, over the objections of the defendants, was called to testify at trial as a court's witness. The court examined her and then the state and counsel for each of the defendants cross-examined her.

Ms. Shaw testified at trial as follows. At and around the time of the crimes, she and the appellant lived together in a house on Revell Road in Wauchula, and that they had held themselves out to friends and neighbors and in business transactions as husband and wife for twelve years. Her daughter Jeanette was married to Sampson Armstrong and lived in Lake Placid. On the weekend preceding Tuesday, April 1st, Ms. Shaw celebrated a birthday. On Friday night, Jeanette came to her home. On Sunday, she and Jeanette went to Lake Placid and brought Sampson back. On Monday night, March 31, Jeanette, Sampson, and the appellant Enmund were all there at the house in Wauchula. On Tuesday, April 1st, when she awoke at about 7:45 a.m., none of the three was there. Neither was her brown and yellow 1969 Buick.

Ms. Shaw got up and went to the neighborhood wash house. About ten minutes later, either Enmund or Sampson Armstrong came into the wash house and told her that Jeanette had been shot. Ida Jean Shaw went back to the house. Jeanette was in the appellant's red Plymouth automobile. Sampson was with her and the appellant was in the house. Ms. Shaw then took Jeanette up to the local store corner and called an ambulance.

Then appellant Enmund came to the corner where they were awaiting the ambulance and asked her what had happened to Jeanette. Ida Jean Shaw told Enmund that Jeanette had been shot in an orange grove. Then the ambulance came and Ida Jean accompanied Jeanette on the ride to the hospital. Ida Jean learned from Jeanette how she was shot. Earl followed in a separate car. Sampson Armstrong also went to the hospital that day.

After spending Tuesday morning at the hospital, Ms. Shaw left there with Earl and Sampson. They went to Wauchula to get the children and then went on to Lake Placid. On the way to Wauchula, Ida Jean Shaw asked the appellant "why he did it." He replied that he had seen Mr. Kersey's money and therefore decided to rob him. Sampson Armstrong said that he made sure the people were dead.

Ida Jean Shaw testified further that on Wednesday, April 2, 1975, she, Earl, Sampson, and some of her children were in a car on their way home from the hospital when Sampson gave her $200. By passing written notes in the car, she asked him how much money he got out of the robbery and he responded that he had $600 left. She took the $200 and made a loan payment on an account of Earl Enmund's that was in arrears. There was corroborating testimony of this, and that the bill was paid with two one-hundred-dollar bills.

Ms. Shaw testified that prior to the events of April 1st, she kept a .22 caliber pistol in the glove compartment of her car. On April 2, she removed the gun from the loft at her house on Earl Enmund's directions. He and Sampson told her to get rid of the gun and also a .38 caliber pistol that was at the house, because, Sampson said, they had been used to kill some people. She put the guns in the bottom of a bucket of greens and gave the bucket to a friend, Jeanette's paternal uncle. This person testified that the bucket was a large and heavy metal one and that the greens spoiled in the trunk of his car. He said he threw them away, bucket and all, and didn't know about the guns. The murder weapons were never recovered.

At trial Ms. Shaw testified that the story about Luke and Willie was a complete fabrication, and that she made up the story and related it at the request of the defendants. Earl Enmund, she said, instructed her on this matter in letters smuggled out of the jail.

The state's counsel moved that Ida Jean Shaw be called as a court's witness on the ground that due to the inconsistencies in her pretrial statements, the state was not certain how she would testify and would not vouch for her credibility. Through her examination by the court, cross-examination by the state, and cross-examination by counsel for each of the defendants, the following matters pertaining to her credibility were brought out for consideration by the jury. Ms. Shaw was granted immunity from prosecution for any role she might have played in the murders and robbery. As related above, she gave several inconsistent statements during the investigation and prosecution of the crimes. One of her statements was in a deposition under oath, and at trial she conceded that she had lied in that statement. Prior to the trial, she was charged with perjury. She was arrested and held in jail for thirteen days. The prosecutors advised her of the maximum penalty for the crime of which she stood accused. Then they promised her that she would not be prosecuted for perjury if she would testify at the murder and robbery trial and tell the truth.

II. Issues on Appeal of the Judgment of Conviction

The appellant raises several points which he contends require the reversal of his convictions.

The appellant contends that the trial court erred in refusing to grant judgment of acquittal of the charge of robbery on the ground that there was insufficient evidence to support the verdict of guilt of that crime. We have carefully reviewed the record of the proceedings below and conclude that the judgment of conviction of the crime of robbery rests upon legally sufficient evidence.

The appellant argues that the trial court erred in denying his motion to exclude the testimony of Ida Jean Shaw.

He asserts that her inconsistent pretrial statements, which resulted in a charge of perjury, rendered her so unreliable as to be an incompetent witness. He also contends that the pendency of her perjury prosecution, which she was promised would be discontinued if she would testify truthfully, created an unacceptably high risk that her testimony would be the product of coercion.

With regard to the unreliability argument, the trial court informed the jury that Ms. Shaw was being called as a court's witness because the state could not vouch for her credibility. The jury was instructed to consider her testimony and to accord it whatever credibility they thought it deserved. It is within the discretion of the trial judge to call an uncooperative witness as a court's witness to allow the state to ask leading questions. *McCloud* v. *State*, 335 So.2d 257 (Fla. 1976).

With regard to the issue of coercion, the appellant cites *Davis* v. *State*, 334 So.2d 823 (Fla. 1st DCA 1976), *cert. denied*, 345 So.2d 427 (Fla. 1977), and *Lee* v. *State*, 324 So.2d 694 (Fla. 1st DCA 1976). The *Lee* case quoted this Court's statement in *Mathews* v. *State*, 44 So.2d 664 (Fla. 1950), that

> in interviews with witnesses before trial, the examiner "must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."

Lee v. *State*, 324 So.2d at 698.

In *Davis*, the prosecuting attorney asked the trial court to delay the swearing of the jury because one of the witnesses he intended to call had become uncooperative. The witness, a close friend of the defendant, had made a statement in a deposition which linked the defendant to the crime but immediately before trial gave a different account of what she knew. The prosecutor conferred with her and told her that she had three choices: refuse to testify and be held in contempt of court and jailed; give an account that differed from her deposition statement

and be charged with perjury and possibly imprisoned for fifteen years; or testify to "the truth" in which event nothing would happen to her. The circumstances of the prosecutor's conference with the witness were revealed to the jury. On appeal, the district court reversed and remanded for a new trial, citing as authority *Lee* v. *State*. Applying the *Lee* principle to the facts before it, the court in *Davis* concluded:

> While it is true that the assistant state attorneys admonished the witness to tell the truth, it must have been obvious to the witness that the "truth" was that which she had testified to at an earlier deposition. Rules of evidence and procedure exist which are designed to assist prosecution and defense alike in eliciting the truth from balky witnesses. Coercion and threats are not among these rules.

Davis v. *State*, 334 So.2d at 826.

The appellant contends that when the prosecution told Ida Jean Shaw that she could be released from jail and have the perjury charges dropped if she would tell "the truth," there is an unacceptably high probability that she understood that the "truth" the prosecution wanted was testimony linking the appellant to the crimes. We disagree. In *Lee* v. *State*, the error was not in allowing the witness to testify but in keeping from the jury information regarding the arrangement by which the state gained the cooperation of the witness. In *Davis*, the prosecutor indicated to the witness that she should testify consistently with what she said before. Thus he "injected" information. In the case *sub judice*, the prosecution did not suggest to Ms. Shaw what they wanted her to say, but simply advised her to tell the truth. We hold that the court did not abuse its discretion in allowing into evidence the testimony of Ida Jean Shaw.

The appellant contends that a new trial is required because the jury was not fully informed of the understanding between the state and Ida Jean Shaw. It is

true, as appellant points out, that it is a denial of due process if the jury is misled as to facts bearing on the credibility of a witness. *Napue* v. *Illinois*, 360 U.S. 264 (1959). If a failure to fully inform the jury of the interest of a witness could in any reasonable likelihood have affected the decision of the jury, a new trial is required. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Wolfe* v. *State*, 190 So.2d 394 (Fla. 1st DCA 1966). Our review of the record reveals that the jury in the present case was fully informed of Ms. Shaw's immunity transaction and her pending perjury prosecution.

The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to each of the homicides is murder in the second degree, based on the felony murder rule.

In support of this contention appellant cites the distinction drawn by this Court in *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), between first-degree felony murder and second-degree felony murder. At the time of the crimes, the degrees of homicide were defined by section 782.04, Florida Statutes (1973). The definitions of murder given in that statute had been revised by chapter 72-724, Laws of Florida, and those revisions were construed in *Dixon*. The Court said that the new statute established "two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree." *State* v. *Dixon*, 283 So.2d at 11. Section 782.04 as amended by chapter 72-724 evinced a legislative intent "to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a

party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree." *Id.* at 11. The distinction had previously been laid to rest for all purposes by chapter 57-310, Laws of Florida. *See* § 776.011, Fla. Stat. (1973).

In a later case, the Court explained that the *Dixon* construction had provided a limited scope to the second-degree felony murder provision, and held that under the murder statute as amended by chapter 72-724,

> an individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. In such circumstances, the statutory scheme does not allow for a conviction of second degree murder. Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case.

Adams v. *State*, 341 So.2d 765, 768-69 (Fla. 1976), *cert. denied*, 434 U.S. 878 (1977) (footnote omitted). We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him an accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict

of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." *State* v. *Dixon*, 283 So.2d at 11.

All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree. They are both equally guilty of the crime being committed. *Lake* v. *State*, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit such offense." *Kauz* v. *State*, 98 Fla. 687, 124 So. 177, 178 (1929). *See generally Henderson* v. *State*, 70 So.2d 358 (Fla. 1954); *Albritton* v. *State*, 32 Fla. 358, 13 So. 955 (1893).

The legislature did away with these distinctions when it enacted section 776.011, Florida Statutes (1973). Ch. 57-310, § 1, Laws of Fla. Section 776.011 provided:

> 776.011 Principal in first degree.—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

However, when the legislature amended the law of murder in 1972, ch. 72-724, Laws of Fla., it revived a distinction, according to this Court's construction in *Dixon* and *Adams*, between principals of the first and second degree on the one hand and accessories before the fact on the other, for purposes of distinguishing first and

second degree felony murder. This is why the pre-existing case law on that distinction is still relevant. The law of murder as amended by chapter 72-724 was in force at the time of the crimes at issue herein. It provided:

> 782.04 Murder.—
>
> (1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.
>
> (b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.
>
> (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

> (3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

§ 782.04, Fla. Stat. (1973).

In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. *E.g. Pope* v. *State*, 84 Fla. 428, 94 So. 865 (1922). Furthermore,

> the presence of the aider and abetter need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.

Id. at 446, 94 So. at 871.

There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. J. B. Neal's account of what Sampson Armstrong told him did not include any reference to Enmund. Ida Jean Shaw testified to Enmund's absence that morning and his statements of his complicity. But the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred

feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a).

The judgment of conviction of two counts of first-degree murder and one count of robbery is therefore affirmed.

III. Sentence

We come now to the consideration of the sentences of death imposed on the appellant pursuant to section 921.141, Florida Statutes (Supp. 1974). The appellant has presented a number of arguments in his brief, only a few of which we find merit consideration.

Appellant contends that section 921.141 improperly restricts the jury and judge to the consideration of the mitigating circumstances enumerated in the statute. Thus, he argues, the statute violates the eighth and fourteenth amendments under *Lockett* v. *Ohio*, 438 U.S. 586 (1978). We have held that our statute, as it has been construed and applied, does not restrict the jury's consideration and differs from the statute considered in *Lockett*. *Songer* v. *State*, 365 So.2d 696, 700 (1978) (on rehearing), *cert. denied*, 441 U.S. 956 (1979). *See generally Proffitt* v. *Florida*, 428 U.S. 242 (1976); *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973).

Appellant contends that the trial judge's factual findings on which he based the decision to impose death were derived in part from information not disclosed to the appellant and which he therefore had no opportunity to rebut, explain, or deny. A death sentence based on such nondisclosed information would violate the rule of *Gardner* v. *Florida*, 430 U.S. 349 (1977). During the pendency of this appeal, we directed the judge who imposed the sentences in this case to state whether he did so based

on any such nondisclosed information. We are satisfied from his response that there was no due process violation under *Gardner*.

The appellant advises us that Jeanette Armstrong, originally a co-defendant with him, was tried separately, convicted of two counts of second-degree murder and one count of robbery, and sentenced to three consecutive life sentences. He argues that his death sentences must be vacated because the jury was not advised of the ultimate disposition of the charges against Jeanette Armstrong.

In *Messer* v. *State*, 330 So.2d 137 (Fla. 1976), we vacated the sentence of death, partly on the ground that the court erred in refusing to permit the defendant to submit to the jury evidence of the plea-bargained conviction and sentence of the appellant's accomplice. Any evidence reasonably related to a valid mitigating consideration should, when proffered by the defendant, be admitted into evidence at the sentencing phase of a capital felony trial. *See, e.g., Miller* v. *State*, 332 So.2d 65 (Fla. 1976). Appellant did not proffer the evidence in question. Therefore, even assuming the information had some valid mitigating value, we can find no trial court error under the *Messer* rule.

Appellant contends that since the evidence does not establish that he intended to take life, the death penalty is impermissible under the eighth amendment ban on cruel and unusual punishment. Appellant offers us no binding legal authority that directly supports this proposition, and we therefore reject it.

After the sentencing hearing was held and sentencing arguments presented to the jury, the jury recommended a sentence of death. The trial judge sentenced appellant to death and subsequently put his findings and considerations in writing as follows:

> In accordance with the mandate of the Florida Supreme Court the Court makes the following findings of fact:

1. As an aggravated circumstance, the capital felony, that is, the murders of Thomas Henry Kersey, aged 86 years and his wife Eunice Maye Kersey, aged 74, were committed while the defendant Enmund was engaged, or was an accomplice, in the commission of or an attempt to commit an armed robbery. FS 921.141(5)(d).

2. As a further aggravating circumstance, the Court finds that the capital felony was committed for pecuniary gain. FS 921.141(5)(f). The evidence is abundantly clear that the armed robbery was committed for pecuniary gain and that the defendant Enmund was previously aware that Mr. Kersey had a reputation for keeping large sums of money on his person. The defendant Enmund actually saw Mr. Kersey with money, and the testimony amply indicates that the armed robbery of April 1, 1975, was planned ahead of time by the defendant Enmund.

3. As a further aggravating circumstance, the Court finds that the capital felony was especially heinous, atrocious, or cruel. FS 921.141(5)(h). The evidence amply supports a finding that the killing of Mr. Kersey aged 86, and Mrs. Kersey aged 74, was not a spontaneous matter. A reasonable person must conclude that the killings were done for no other purpose than to eliminate Mr. and Mrs. Kersey as witnesses to the armed robbery. The killings were premeditated in that Mr. Kersey was shot two (2) times and Mrs. Kersey was shot six (6) times. Two (2) bullets were subsequently recovered from the house, one (1) in the water heater and one (1) in the doorjamb. The medical examiner testified that in his opinion the bodies had to have been shot while in a prone position (his alternative explanation was that someone could have stood on a roof and shot down, or else tied the Kerseys' by their feet, hoisted them up and shot them from below). The entry of the bullets indicates that Mr. and Mrs. Kersey were

in a prone position, that is, helpless to resist. The evidence indicates that Mrs. Kersey was shot first in the left side and that these wounds were not fatal, and that thereafter someone stood back and fired upon her prone body and then fired the bullets into the heater and the wall. Further, two (2) different weapons, that is, a .22 caliber weapon and a .38 weapon were fired at and into Mr. and Mrs. Kersey.

Three individuals were charged with these crimes. The defendant Enmund and the defendant Sampson Armstrong were tried together and the defendant Jeanette Armstrong was tried separately. The Court knows from this trial and from the trial of Jeanette Armstrong that she was shot at the scene and sustained serious wounds. Since the defendant Jeanette Armstrong was seriously wounded and since both Mr. and Mrs. Kersey were each shot with bullets from two (2) different caliber guns, and since the evidence establishes that Mr. and Mrs. Kersey were each shot while in the prone position, it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey.

4. As a further aggravating circumstance, the Court finds that the defendant Enmund was previously convicted of a felony involving the use or threat of violence to the person. FS 921.141(5)(b). At the advisory hearing the State introduced a certified copy of a Judgment and Committment [sic] from the United States District Court, Southern District of Georgia, establishing that on April 10, 1957, the defendant Enmund was convicted of two (2) separate offenses of robbery by the use of violence.

5. The other aggravating circumstances to-wit: FS 921.141(5)(a); 921.141(5)(c); 921.141(5)(e); and, 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving the defendant Earl Enmund, the Court finds that *none* of the statutory mitigating circumstances applied to this defendant:

1. In particular, the Court has considered FS 921.141(6)(a), and finds that the defendant has previously been convicted of the felony of robbery.

2. As to FS 921.141(6)(b), there is absolutely no evidence or suggestion that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. As to FS 921.141(6)(c), there is absolutely no evidence that the victims were a participant in the defendant's conduct or consented to the act.

4. As to FS 921.141(6)(d), the evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.

5. As to FS 921.141(6)(e), there is absolutely no evidence that defendant acted under extreme duress or under the substantial domination of another person.

6. As to FS 921.141(6)(f), there is absolutely no evidence that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. As to FS 921.141(6)(g), the defendant was 42 years of age at the time of this offense.

Therefore, in consideration of the evidence presented at trial and at the sentencing hearing as to the defendant Earl Enmund, the Court finds that the aggravating circumstances of these capital felonies outweigh the mitigating circumstances, and upon consideration thereof, the Court was of the

> opinion at the time of sentencing and is now, some months later, that the sentence of death is justified and appropriate as to each Count of Murder in the First Degree.

The judge's findings that the capital felonies were committed in the course of robbery and that the capital felonies were committed for pecuniary gain both "refer to the *same aspect* of the defendant's crime." *Provence* v. *State*, 337 So.2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969 (1977). The robbery circumstance and the pecuniary motive constitute "only one factor which we must consider in this case." *Id.* at 786. Where such double consideration of one factor appears to have impaired the process of weighing the aggravating circumstances against the mitigating circumstances, the sentence of death must be vacated. *See Elledge* v. *State*, 346 So.2d 998 (Fla. 1977). The "mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment." *Hargrave* v. *State*, 366 So.2d 1, 5 (Fla. 1978), *cert. denied*, 444 U.S. 919 (1979). Here, even absent the consideration of either of the factors of robbery and pecuniary gain, there remains one valid statutory aggravating circumstance to consider. There are no mitigating circumstances. The fact that the murders took place in the course of a robbery and that the criminal episode was motivated by pecuniary gain will therefore simply be treated as one factor.

The recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved. *Armstrong* v. *State*, Case No. 48,516, (opinion filed March 26, 1981). However, there are two aggravating circumstances (robbery-pecuniary gain and previous conviction of a violent felony) and no mitigating circumstances. The jury recommended death. The finding that no mitigating circumstances were present was not error. Therefore, the sentence of death is appropriate and we approve it.

The judgment and sentences are affirmed.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD and ENGLAND, JJ., Concur

OVERTON, J., Concurs in part and dissents in part with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring in part, dissenting in part.

I concur in affirming the conviction. I dissent in the sentence and would remand for resentencing in view of the specific finding of the majority that the appellant did not actually participate in the shooting. In his sentencing order the trial judge found to the contrary, expressing the view in his findings of aggravating circumstances that the appellant was present and assisted in the commission of the murder. In my opinion, these contrary findings require a resentencing proceeding.

An Appeal from the Circuit Court in and for Hardee County, William A. Norris, Jr., Judge—Nos. 75-122 and 75-123

Jack O. Johnson, Public Defender; Steven H. Denman, W.C. McLain, and David A. Davis, Assistant Public Defenders, Bartow, Florida, for Appellant

Jim Smith, Attorney General, Donald K. Rudser and Charles A. Stampelos, Assistant Attorney Generals, Tallahassee, Florida, for Appellee

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1981

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